

Adv. Case No. 8-16-08178-reg

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DOWLING COLLEGE,

Debtor.

-----X

ZAIKOWSKI,

Plaintiff,

v.

DOWLING COLLEGE,

Defendant.

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United States Bankruptcy Court
Long Island Federal Courthouse
Central Islip, New York 11722

November 27, 2017

1:39 PM

B E F O R E:

HON. ROBERT E. GROSSMAN

U.S. BANKRUPTCY JUDGE

ECRO: MT/DB

1
2 HEARING Re [4] ADJ Summons and Notice of Pre-Trial Conference

3
4 HEARING Re [74] ADJ Order Scheduling Initial Case Management
5 Conference.

6
7 HEARING Re [432] Second Application for Compensation by
8 Silverman Acampora LLP as Counsel to the Official Committee
9 of Unsecured Creditors for Fees of \$187,610.50 Expenses:
10 \$906.94 by Ronald J Friedman on behalf of Official Committee
11 Of Unsecured Creditors.

12
13 HEARING Re [437] Interim Application for Compensation by
14 Farrell Fritz, P.C. as Special Counsel for Fees of
15 \$13,659.00 Expenses: \$307.72 by Patrick T Collins on behalf
16 of Farrell Fritz, P.C.

17
18 HEARING re [433] Interim Application for Compensation by
19 Klestadt Winters Jureller Southard & Stevens, LLP as General
20 Bankruptcy Counsel to the Debtor and Debtor in Possession for
21 Fees of \$855,933.15 Expenses: \$11,385.56 by Sean C Southard
22 on behalf of Dowling College.

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HEARING re [434] Final Application for Compensation by Hilco
IP Services, LLC d/b/a Hilco Streambank as Broker for the
Debtor for Fees of \$51,118.08 Expenses: \$0.00 by Sean C
Southard on behalf of Dowling College.

HEARING Re [435] Interim Application for Compensation by
Eichen & DiMeglio, P.C. as Accountants to the Debtor and
Debtor in Possession for Fees of \$20,550.00 Expenses: \$485.37
by Sean C Southard on behalf of Dowling College.

HEARING Re: [436] Interim Application for Compensation by FPM
Group, LTD. as Consultants to the Debtor and Debtor in
Possession for Fees of \$29,346.05 Expenses: \$3,478.57 by Sean
C Southard on behalf of Dowling College.

Transcribed by: Sonya Ledanski Hyde

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20 BY: IAN HAMMEL (TELEPHONICALLY)

21

22

23

24

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1 P R O C E E D I N G S

2 CLERK: -- presiding.

3 THE COURT: Good afternoon.

4 UNISON: Good afternoon.

5 THE COURT: Please be seated.

6 CLERK: Matter number 78 through 85. Dowling
7 College.

8 MR. SOUTHARD: Good afternoon, Your Honor. Sean
9 Southard, placed at Winters, Jureller, Southard and Stevens
10 on behalf Dowling College, Debtor in Possession. With me
11 this afternoon, Your Honor, is my colleague, Lauren Kiss.

12 MR. FRIEDMAN: Good afternoon, Your Honor. Ronald
13 Friedman from Silverman Acampora. Counsel to the Creditors.

14 MR. COLLINS: Good afternoon, Pat Collins.
15 Farrell, Fritz, Special Counsel to the Debtor.

16 MR. MCCORD: Good afternoon, Your Honor. From
17 Certilman Balin, Richard McCord for ACA Financial.

18 MR. YANG: Good afternoon, Your Honor. Stan Yang
19 for the United States Trustee.

20 MR. KLEINBURG: Howard Kleinberg, Meyer Suozzi for
21 the Dowling Board of Trustee Members.

22 MR. RAISNER: Good afternoon, Your Honor. Jack
23 Raisner on behalf of Lori Zaikowski, (indiscernible).

24 CLERK: Please state your phone appearance?

25 MR. HAZAN: Jack Hazan, on behalf of Hilco

1 Streambank.

2 MR. HAMMEL: And good afternoon, Your Honor. Ian
3 Hammel on behalf of UMB Bank.

4 CLERK: That's it.

5 THE COURT: Is that it? Okay.

6 MR. SOUTHARD: Thank you, Your Honor. Your Honor,
7 there are a few matters on the calendar today, but I thought
8 I would start off with a brief status update for Your Honor.
9 The -- we are just about a year into this case now, Your
10 Honor, and in terms of the progress on a plan of liquidation,
11 I can report that the Debtor has drafted and circulated to
12 the major constituents a draft of that plan about 10 days
13 ago; two weeks ago. And I do expect, subject to a change in
14 circumstances that's unforeseen at present, that we should be
15 able to make the filing deadline under Your Honor's last
16 exclusivity extension order, which I believe is January 23rd.
17 And we are essentially awaiting feedback from the Creditor
18 parties on that draft; although we did have some discussions
19 -- some meaningful discussions -- about the structure and the
20 like before we put that draft out.

21 In relation to the sort of largest open item now
22 before, Your Honor; the Brookhaven Campus Salem the parties -
23 - the Debtor and its brokers together with the -- again,
24 different Creditor constituents have discussed the current
25 schedule and based on the status of the marketing effort,

1 which I'm pleased to say includes a lot of interest including
2 some very recent showings for the first time to interested
3 parties, that it has been suggested since we're pressing up
4 on the holiday season and there seems to be a lot of
5 competition for yearend deal closing attention; that we
6 should push off until after the New Year, the proposed bid
7 deadline auction and then sale approval hearing.

8 So Your Honor, will recall that we had -- based on
9 the existing bidding procedures order and bidding procedures
10 set a bid deadline of December 4th with a potential auction
11 on December 7th. The sale hearing was then set before Your
12 Honor for December 18th. What the parties have discussed and
13 conferred about would be a proposed amended schedule, subject
14 to Your Honor's views of a bid deadline of January 25, 2018
15 with a potential auction date of January 31st. And then an
16 ideal sale hearing being on February 5th; which I think was a
17 date that was available on Your Honor's calendar.

18 So I wanted to bring that update to Your Honor's
19 attention. That is the consensus after consideration of the
20 Debtor's advisors, as well as the different Creditor parties,
21 including the Committee all are in consensus on moving that
22 process out beyond the New Year.

23 THE COURT: If that's what the brokers and
24 everybody thinks is the right way to do it; I don't have
25 input on that.

1 MR. SOUTHARD: Thank you, Your Honor. I appreciate
2 that. So what we would intend to do then would be to notice
3 -- file an updated notice on the docket. And also, serve
4 that notice on the relevant interested parties giving those
5 new dates and deadlines. Separately, the brokers will reach
6 out to all of the interested parties that they know to exist
7 now and make those new deadlines known to them. And any
8 further marketing that would be done by them would,
9 obviously, identify these new dates and deadlines. So I
10 appreciate that, Your Honor.

11 And I think that subject to Your Honor's questions
12 on other pending status items could bring us to the agenda
13 today.

14 THE COURT: All right.

15 MR. SOUTHARD: So first on the proposed agenda,
16 Your Honor. Well, I guess the first several matters on the
17 agenda are really the fee applications of the various
18 professionals in the case. Those include my firm, as counsel
19 to the Debtor; Silverman Acampora as counsel to the Official
20 Committee of Unsecured Creditors. Those are both interim fee
21 applications; second interim, in fact. And then we have
22 Hilco IP Services doing business as Hilco Streambank. Mr.
23 Hazan is on the phone, on behalf of them and that is a final
24 fee application for Hilco. They were -- had a discreet role
25 in relation to the sale of the Debtor's IP addresses that

1 closed back in the late summer. So they have actually
2 already been paid that fee, but this is a final hearing to
3 approve that contingent fee arrangement.

4 Then, there's the Eichen and DiMeglio firm as the
5 Debtor's accountants, tax accountants. FPM Group Limited,
6 the Debtor's consultants in relation to some of the planning
7 that took place in relation to the Brookhaven property. And
8 then, finally the Farrell Fritz firm as special counsel to
9 the Debtor in a similar role related to the Brookhaven
10 planning process.

11 Your Honor, the fee applications -- all of which,
12 again, are interim with the exception of Hilco, cover the
13 period from April 1st through September 30th. So roughly a
14 six-month period and those fee applications were noticed up
15 properly and widely. I'm pleased to say there are no
16 objections that have been filed or received. There was one
17 discussion that took place with the US Trustee's Office in
18 relation to the request by the professionals to release the
19 prior interim holdbacks that were in place, which is
20 basically 20 percent of the fees incurred for the interim
21 periods.

22 And there was some concern by the US Trustee's
23 Office about whether that should be permitted under the
24 circumstances of these cases. And a -- sort of an
25 alternative compromise proposal was discussed and I believe

1 is supported by the US Trustee's Office at this point. Which
2 is that of the two interim periods for which there are 20
3 percent holdbacks on account of each period, that the first
4 interim holdback period would be released, subject to Your
5 Honor's approval, which happens to be the smaller of the two
6 periods in terms of aggregate holdback amounts. And I
7 believe with that modification to the applications, the US
8 Trustee's Office would support the payment of fees in that
9 respect.

10 I'm not sure, Your Honor, if you'd like me to take
11 you through each of the individual amounts and
12 responsibilities and action by each of the professionals --

13 THE COURT: Have all these fees been paid?

14 MR. SOUTHARD: Yes, Your Honor. They have all been
15 paid to the tune of 80 percent, thus far, in accordance with
16 Your Honor's interim fee compensation order. So for the
17 period through September --

18 THE COURT: But if the remaining property is sold
19 at less than one expects it to be sold for, how are the
20 professionals all getting paid at the end? Are the banks
21 paying them?

22 MR. SOUTHARD: Your Honor, the --

23 THE COURT: Is there a carveout that covers all the
24 fees incurred?

25 MR. SOUTHARD: Correct, Your Honor. The fees in

1 question, including the holdbacks, have always been a part of
2 the budget which was approved by the lenders here and is also
3 part of committed amount of the facilities in place in terms
4 of the Debtor possession financing. So --

5 THE COURT: Now, are the fees that the lenders are
6 committed to allow you to take, part of the total amount that
7 the secured Creditor is willing to tender for a distribution?
8 In other words, the lower your fees, is the higher the
9 distribution?

10 MR. SOUTHARD: The lower our fees, I guess,
11 hypothetically in the aggregate; the notion that if there are
12 less administrative amounts paid out, that at the end of day
13 -- and that would include not only professional fees, but any
14 administrative costs. If there are less in the aggregate,
15 then there could be more in the end that flows out to
16 possibly the --

17 THE COURT: So the carveout is of any number, a
18 percentage, ultimately, of whatever the total recovery is,
19 correct?

20 MR. SOUTHARD: I'm not sure which carveout you're
21 speaking to, Your Honor.

22 THE COURT: How do the people -- you have a class
23 action case we're going to talk about today. They get a
24 judgment. You get a -- other claims; there's claims in this
25 case. If the property in -- the remaining property is sold

1 for less than originally anticipated, I assume the total
2 amount of the carveout is less because it's all a percentage.
3 Or, is that not right?

4 MR. SOUTHARD: It -- okay, I now understand.
5 You're talking about the carveout in terms of the amount that
6 was --

7 THE COURT: The deal with the Committee part.

8 MR. SOUTHARD: -- set aside for the Unsecured
9 Creditors, right?

10 THE COURT: Right.

11 MR. SOUTHARD: So Your Honor, that -- there is a --
12 by asset classification, there is a minimum dollar figure
13 carveout amount that exists in their favor and then, there is
14 a sharing percentage. In essence, an upside sharing
15 percentage on each of those different categories. So it
16 would be on the -- hypothetically on the upside sharing
17 percentage that if there were in the aggregate less
18 administrative costs, there would be more that's billed --

19 THE COURT: Well, why wouldn't it be true on the
20 minimum, too? If there were less administrative costs, the
21 minimum --

22 MR. SOUTHARD: Because under any --

23 THE COURT: -- would generate great --

24 MR. SOUTHARD: -- well, under any circumstance, the
25 minimum will be achieved, I believe.

1 THE COURT: But the amount of the minimum that goes
2 towards administrative claims is unknowable right now. You
3 don't know what the administrative claims --

4 MR. SOUTHARD: Oh, Your Honor, on a --

5 THE COURT: -- are going to be.

6 MR. SOUTHARD: -- on the -- there is no cap on the
7 administrative claims. If that is, if that is your question;
8 or priority. The priority would be paid in full.

9 THE COURT: Yeah, I'm not asking this right. If
10 the minimum generated \$5 million dollars. If it -- I don't
11 care what number you pick, \$5 million dollars. And the deal
12 is from that, the estate gets not less than 20 percent; 10
13 percent -- I don't know. Whatever the number is. Twenty
14 percent; a million bucks. I have a million dollars now
15 sitting there; secured Creditors are gone. They've gotten --
16 taken their money; left. And I have administrative claims of
17 \$999,000. Does that mean that all of the other claims -- the
18 junior claims would split a dollar, or a thousand dollars?
19 Or, do they always get a minimum distribution; regardless of
20 the amount of the administrative claims?

21 MR. SOUTHARD: I believe they always get the
22 minimum distribution. The only, the only caveat I would say
23 is if priority claims and we're talking priority unsecured,
24 not administrative; but priority unsecured. If there were a
25 circumstance where there were not enough of a minimum --

1 THE COURT: Yeah, that I understand. I'm just --
2 MR. SOUTHARD: -- to get through those.
3 THE COURT: I'm making two classes:
4 administrative; everybody else.
5 MR. SOUTHARD: Yeah.
6 THE COURT: Everybody else, as of today, will
7 always get -- regardless of what you guys bill or anybody
8 else -- "x". They could get "x" plus; but they will never
9 get less than "x".
10 MR. SOUTHARD: I believe that to be the case, Your
11 Honor. But Committee's counsel --
12 THE COURT: The what?
13 MR. SOUTHARD: -- who struck the deal can certainly
14 speak to that.
15 MR. FRIEDMAN: That's correct, Your Honor.
16 THE COURT: Okay. So once you get past "x";
17 there's a sharing percentage, right?
18 MR. FRIEDMAN: Yes.
19 THE COURT: And is that sharing percentage limited
20 to the Unsecureds? Because the Administratives always get
21 paid in full?
22 MR. FRIEDMAN: Yes, Your Honor.
23 THE COURT: So your fees should not impact
24 distributions to Creditors?
25 MR. FRIEDMAN: Yes, Your Honor.

1 THE COURT: Or, in other words, but the banks are
2 paying your fees out of their secured claims?

3 MR. FRIEDMAN: Yes, Your Honor.

4 THE COURT: All right. It's their money. Is that
5 how you understand it, Stan?

6 MR. YANG: Yep.

7 THE COURT: All right. Fine. Not me. I guess,
8 it's right; God just spoke. Yeah, so other than the Court
9 and the other appropriate parties reviewing the fees for
10 normal propriety, one of the things I don't have to consider
11 is that the amount of fees impact distribution?

12 MR. SOUTHARD: Correct, Your Honor.

13 THE COURT: All right. Makes life easier. All
14 right, let's go through each one of them.

15 MR. SOUTHARD: Okay. Your Honor, first we'll start
16 with my firm. Your Honor, as I mentioned, this is our second
17 interim application --

18 THE COURT: Klestadt tells me he doesn't need
19 money; he's flush.

20 MR. SOUTHARD: Is that, right? You must be having
21 decidedly different conversation. I would like to record
22 that, Your Honor; if possible.

23 Your Honor, our fee application -- again, is for
24 the period from April 1, 2017 through September 30, 2017;
25 Docket entry number 433. We seek interim compensation for

1 that period in the amount of \$855,933.15. Your Honor, in
2 terms of the amounts paid to date; those total 80 percent of
3 the fees sought and full expenses under the interim
4 compensation order. So the only amount that we are asking to
5 be paid in addition to that, which we've already been paid to
6 date would be the 20 percent holdback associated with the
7 first interim fee period which is for the period November 29,
8 2016 through March 31 of 2017.

9 THE COURT: So you got a 100 grand you want?

10 MR. SOUTHARD: And that's approximately \$104,000,
11 Your Honor; correct. The -- Your Honor, during this second
12 interim period, our firm was lead counsel through a fairly
13 intense period of time that involved the sale process for the
14 Oakdale Campus. Probably the largest amount of our fees
15 incurred are --

16 THE COURT: Yeah, I read through -- too much time
17 on my hands -- all of the timesheets, the fees and
18 everything. It looked like good and bad; well, everybody
19 does. So I learned a long time ago that I can't figure out,
20 having done it myself, what they really mean when a third-
21 party reads them; I deal with worse-case. And you guys got
22 rid of a major piece of property. You fought through a --
23 all of you -- default by one party. Somehow, you got that
24 party to walk away from its deposit; which I still don't
25 understand, but they did. Somebody else is running it and

1 nobody's called me to complain about who's running it or what
2 they're doing. So I consider that a really good.

3 So I'm a little concerned about the second
4 property. But as you say, it fits within the scope you guys
5 cut. And the other part of all of these fee apps these
6 varies in larger cases, which this is out here, is there is a
7 hesitancy. It used to be people would bring their
8 adversaries; their litigation and you could understand it in
9 the context of a plan. Nobody seems to do that anymore;
10 everything is brought in litigation trust. So you've got to
11 confirm a plan and then see what cases, if any, are brought;
12 and over what time those cases generate or don't generate
13 money. It makes it very hard to evaluate plans because it --
14 and yours is not the exception; it's the rule. Nobody's been
15 sued in this case.

16 And yet, there's a significant portion of the
17 disclosure documents that will be, by the way, we have causes
18 of action, I assume. And you can look for additional funds
19 in distributions from those because that was part of the deal
20 you got, which was the -- These claims are Section Action V
21 claims. So for an interim, I'm not going to worry about
22 that. I think you've done what you should do up to this
23 point. But these are interims and it is not that somebody
24 needs to bring an action, but it's the same thing I said in
25 another case out here recently. Somebody has to explain how

1 this all happened. It could be perfectly benign. It could
2 just be the luck of the draw; that's the way it is. But in
3 these kinds of cases, whether it's this or a large not-for-
4 profit, the way we evaluate the case and the public has a
5 right to know how you got there. It affects thousands of
6 people. And again, there may be no culpability on anybody's
7 part; I'm not advocating that there is. But that disclosure
8 document's going to have to explain the analysis and why you
9 reached those conclusions.

10 MR. SOUTHARD: Understood, Your Honor. I think --
11 in very brief response to that. The Debtor will most
12 certainly have a view as to how things went pre-petition; and
13 why they ended up where they did. It will likely be that
14 that view is not necessarily shared in total with the
15 Official Committee of Unsecured Creditors who is going to be
16 investigating matters and has been investigating certain
17 matters to date. So I would envision that there may be two
18 different views expressed in terms of disclosure --

19 THE COURT: This is the time. This is the
20 statutory time is over Wednesday.

21 MR. SOUTHARD: This --

22 THE COURT: Not to bring certain actions. Your
23 extension of one year to bring a case that otherwise would
24 not have been able to be brought is over on Wednesday. You
25 can't bring any of those cases. You may not have any of

1 them. But that has come as a rude awakening to some people
2 in the past. Whatever else you had and I'm sure people have
3 analyzed that, but it wouldn't be good if we find out after
4 the fact that cases that could have been brought were missed.
5 If that happens, that'll be a problem for some people. I
6 remember the lawyers.

7 MR. SOUTHARD: Understood, Your Honor.

8 THE COURT: But outside of that, yeah, I have no
9 problem with this. So unless anybody wants to be heard on
10 this; I'll grant the motion relative to Klestadt and Winters,
11 and I'll release the \$104,579.25.

12 MR. SOUTHARD: Thank you, Your Honor.

13 THE COURT: Which is a whole -- but that is not
14 precedent for releasing holdbacks. It's only because of UST
15 here is an objector.

16 MR. SOUTHARD: Understood, Your Honor.

17 THE COURT: Because if they object to that, I don't
18 release holdbacks; unless there's some emergency for a firm,
19 but that creates other problems. So not having --

20 MR. YANG: Your Honor, I just want to clarify. It
21 -- under this particular case, under the circumstances that
22 we negotiated. And that's why we find their --

23 THE COURT: Yeah, it makes sense. No, you're --

24 MR. YANG: Plus, I don't want anybody having this
25 conception that that's -- this is standard or this is the

1 perceptions of these holdback issue release during interim
2 period. This is a very different case.

3 THE COURT: I agree and that's why I went through
4 the first 10 minutes, the fact that the money that's the
5 subject of this is never really going to Creditors. It's
6 always dedicated to you guys; and if the banks want to pay
7 it, that's fine. I have no problem with it. All right, so
8 Klestadt and Winters is taken care of.

9 MR. SOUTHARD: Thank you, Your Honor.

10 THE COURT: Amazing. Tracey says he doesn't need
11 the money.

12 MR. SOUTHARD: I don't -- again, I would love to
13 get a recording of that.

14 THE COURT: I want you to docket note -- no, I'm
15 kidding. All right, let's go to the next one.

16 MR. SOUTHARD: Your Honor, I will I guess, first go
17 through all of the Debtor professionals. And then, I'll let
18 Committee Counsel speak for their own fees.

19 THE COURT: All right.

20 MR. SOUTHARD: Hilco IP Services, Your Honor, was
21 again retained as a broker in relation to the Debtor's sale
22 of certain IP addresses and had a very successful auction
23 process that resulted in a sale of approximately \$850,000.

24 THE COURT: Hilco is represented, correct?

25 MR. SOUTHARD: Hilco is on the phone. Yes, Your

1 Honor. Represented Mr. Hazan; Jack Hazan is on the phone for
2 them. And --

3 THE COURT: Mr. Hazan, this is your final act,
4 right?

5 MR. HAZAN: Yes, Your Honor.

6 THE COURT: Okay.

7 MR. SOUTHARD: Your Honor, the fees sought are
8 essentially, six percent of the total aggregate sale
9 proceeds.

10 THE COURT: Yeah, I looked at it. I don't have a
11 problem with this.

12 MR. SOUTHARD: Okay.

13 THE COURT: Nobody's objected. Court will grant
14 that motion.

15 MR. SOUTHARD: Thank you very much. Your Honor,
16 then --

17 MR. HAZAN: Thank you, Your Honor.

18 MR. SOUTHARD: The next item we have, next motion
19 is a second interim fee application by Eichen and DiMeglio,
20 P.C. They are tax accountants for the Debtor. Their
21 application was docketed at Number 435. They seek fees on an
22 interim basis for the period of \$20,550. And Your Honor, if
23 --

24 THE COURT: Is there an ERISA plan that's got to
25 closed here?

1 MR. SOUTHARD: There was and it was closed, Your
2 Honor.

3 THE COURT: So we got -- we're done with that?

4 MR. SOUTHARD: Correct.

5 THE COURT: Thank you, okay.

6 MR. SOUTHARD: And that's -- that was part of their
7 function, Your Honor.

8 THE COURT: Yep.

9 MR. SOUTHARD: So the interim holdback for the
10 first period for Eichen and DiMeglio is an amount of
11 \$7,231.40.

12 THE COURT: Yeah, this is -- this is for \$20,000?

13 MR. SOUTHARD: Yes, Your Honor.

14 THE COURT: Any objections on this?

15 MR. SOUTHARD: No objections that we're aware of.

16 THE COURT: Court will grant the motion.

17 MR. SOUTHARD: Thank you, Your Honor. The next,
18 Your Honor, is the application; again, a second interim by
19 FPM Group, Limited. They are the consultants to the Debtor,
20 in relation to the Brookhaven planning process. Your Honor,
21 their application for the period in question is \$29,154.99.
22 And the holdback associated for them with the first interim
23 period is \$5,768.65. Again, no objections. And we would ask
24 --

25 THE COURT: Now, we're releasing the holdbacks on

1 all the first -- on all these orders?

2 MR. SOUTHARD: That is the request, Your Honor,
3 that was discussed and agreed, I believe.

4 THE COURT: Court will grant the motion.

5 MR. SOUTHARD: Thank you, Your Honor. Your Honor,
6 the Farrell Fritz firm then is the last of the Debtors
7 professionals. Their application for the period is for
8 \$13,659. They do not have any holdback associated with the
9 first interim period because of the date of their retention.
10 So the request is for interim allowance for them in the
11 amount of \$13,650 -- 59 dollars. Again, no objections.

12 THE COURT: All right. Court will grant the
13 motion.

14 MR. SOUTHARD: Thank you, Your Honor. I'm happy to
15 address --

16 THE COURT: What are you, choosing sides?

17 MR. SOUTHARD: -- Mr. Silverman.

18 THE COURT: He didn't even have to stand to get his
19 application.

20 MR. SILVERMAN: Just said he was really
21 (indiscernible).

22 MR. SOUTHARD: Your --

23 MR. SILVERMAN: I wondered if I could sit?

24 MR. SOUTHARD: -- you can, if you like. It's up to
25 you. Your Honor, the Silverman Acampora firm; counsel to the

1 Official Committee of Unsecured Creditors has filed a second
2 interim fee application --

3 THE COURT: You're letting him do this for you?

4 MR. SILVERMAN: Let's give him a shot at it.

5 MR. SOUTHARD: I think it's a track record of
6 success this morning -- or this afternoon, Your Honor.

7 THE COURT: Nobody bats a thousand.

8 (Laughter)

9 MR. SOUTHARD: Ouch. Counsel to the Official
10 Committee of Unsecured Creditors, their motion is docketed at
11 Number 432. For the second interim period, they seek
12 allowance of \$187,610.50. Your Honor, for the first interim
13 period, the holdback associated with their firm is
14 \$41,198.50; and they would seek the release of that holdback.

15 THE COURT: Now --

16 MR. SOUTHARD: Again, no objections, Your Honor.

17 THE COURT: The plan is going to provide, I assume,
18 full litigation trust of some form of entity?

19 MR. SOUTHARD: Yeah, that is what the current
20 drafts provides for a trust.

21 THE COURT: And will the Silverman firm be retained
22 for that? To do the work for that?

23 MR. SOUTHARD: Highly likely, Your Honor.

24 THE COURT: Okay. All right. Court will grant the
25 motion. Well, I'll wait a second.

1 MR. SOUTHARD: Thank you, Your Honor.

2 MR. SILVERMAN: Thank you, Your Honor.

3 THE COURT: Kenny doesn't need money, either. None
4 of you guys --

5 MR. SILVERMAN: He didn't say it's (indiscernible).

6 THE COURT: It's you guys (indiscernible).

7 MR. SILVERMAN: You know how that ought to go.

8 THE COURT: Your senior guys are all flush. Court
9 grant the motion.

10 MR. SOUTHARD: Thank you very much, Your Honor. I
11 believe that takes care of all of our fee -- professional fee
12 applications today.

13 There's one other matter on the calendar today,
14 Your Honor. And that is the adjourned pre-trial conference
15 associated with the Zaikowski litigation; which is the Warren
16 Act litigation that we've spoken with Your Honor about now on
17 --

18 THE COURT: This is a class action?

19 MR. SOUTHARD: -- several occasions. It is, indeed,
20 a class action, Your Honor. It served -- the class was
21 certified by Your Honor by order of this Court; I believe
22 back in May of this year. And Your Honor, we had proceeded
23 to mediation with the assistance of Mr. (indiscernible) and
24 the parties have essentially been sharing information. The
25 Debtor was doing a great deal of diligence and calculations

1 about the different buckets of claims that exist for what
2 are, essentially, about 300 employees that we're talking
3 about within the --

4 THE COURT: These are the --

5 MR. SOUTHARD: -- broad context --

6 THE COURT: -- the teachers through any other
7 employee?

8 MR. SOUTHARD: Correct, Your Honor.

9 THE COURT: Okay.

10 MR. SOUTHARD: There are three different sets of
11 unionized labor. There then is a large group of unaligned
12 employees; but it governs all the terminated employees from
13 the professors to the maintenance folks who worked in the
14 different facilities. And each of them had a slightly
15 different, sometimes largely different entitlement under the
16 different documents. And I -- where we are today, Your
17 Honor, is I think we've made a good deal of progress, but
18 we're not there yet. I do, however, believe that based upon
19 the progress we've made over the weekend, that it's time to
20 fold into our discussion the Official Committee of Unsecured
21 Creditors and to some extent, the Secured Creditors who, Your
22 Honor, pointed out previously ultimately pays the freight on
23 this one. I think the Debtor has taken matters and framed
24 matters, as well as they can under the circumstances. There
25 is a proposal now that is material on the table and I think

1 it's time for us to fold in -- first the Committee into that
2 discussion and my proposal and my goal, Your Honor, would be
3 for the Court, would be to come back before you on December
4 the 18th, which I believe is our next hearing date before the
5 Court. Hopefully, with a settlement that's been agreed to by
6 those major case constituents, which would then permit us to
7 go out with that proposal to the affected employees.

8 THE COURT: Has anybody determined what the maximum
9 exposure potentially is?

10 MR. SOUTHARD: We have, Your Honor, come up with --
11 there are a couple of different, as you would imagine,
12 viewpoints on what those maximum damages could be. But they
13 are -- they're north of a million dollars in terms of the
14 Warren Act piece. But one of the things that I think that's
15 important to understand about why we've been taking some
16 additional time with this is it -- our goal and our proposal
17 is going to be resolve all of the employee claims, as part of
18 this settlement. So that we are able to button it all up,
19 for lack of a better phrase and let employees know exactly
20 what they'll get in terms of priority and non-priority
21 unsecured claims as a result of this negotiation.

22 THE COURT: Well, let me suggest to you that -- I
23 think that's a good idea for two reasons. One, it makes
24 sense to limit the amount of litigation we have to spend in
25 this case. And class action lawsuits, I guess a couple of

1 you have been through one with me we had out here years ago
2 and there's been some new ones as well; it's an expensive
3 proposition. And the percent of those fees, of the
4 collection that goes to the counsel, has become an issue as
5 I'm sure people are aware of. One just in the Southern
6 District which was a class action suit by someone claiming
7 there was too much pulp and orange; I don't know, one of
8 these cases. And a hundred percent of the money went to the
9 lawyers; and the individuals who were in the class action got
10 coupons to get canned orange juice or something, which was a
11 similar result to what we found in another case out here. It
12 made sense, but with this constituency, that would be a hard
13 result.

14 MR. SOUTHARD: Yeah.

15 THE COURT: Put it that way.

16 MR. SOUTHARD: I agree, Your Honor. And certainly
17 from the Debtor's perspective, we can appreciate that dynamic
18 and our -- in part, going to fold in the Committee for --

19 THE COURT: I --

20 MR. SOUTHARD: -- that consideration.

21 THE COURT: -- and the second, the second reason,
22 just so you should be aware is I had a case -- I have a case.
23 I had a hearing last week on the disclosure statement in a
24 large case, not-for-profit, where the debate now is third-
25 party releases. Judge Bernstein issued a decision last week

1 -- last week; probably wrote it two weeks ago -- last week
2 and it's a place where I have gone before.

3 And in his case, I read the decision; I agree with
4 his decision. There are cases all over the lot now. Some of
5 the cases just came out of another circuit where the argument
6 clearly is that we have jurisdiction to grant third-party
7 releases, which Judge Bernstein didn't think we do. My
8 intuition is I do; but that will depend on the case. But my
9 general feeling is I'm not going to grant them.

10 And the disclosure statement to the extent people
11 view that as a confirmation issue; then the disclosure
12 statement is going to need to disclose the mechanism by which
13 a individual being asked to vote is treated if they vote. If
14 they don't vote at all, can they vote to grant a release? In
15 that sense, you could have a narrow group. Can they opt out
16 of the release and get the distributions?

17 But I think it's something you need to consider
18 when you're drafting your documents; because these guys had
19 to go back and revisit this. And I figured it's worth me
20 explaining because in all of these cases, especially in the
21 not-for-profits, you might consider this. The role of
22 directors -- officer and director is a challenging one for
23 the Court to determine because everybody wants releases. And
24 I don't blame them, for wanting them; unless these guys don't
25 get paid for sitting on these Boards.

1 MR. SOUTHARD: They do not.

2 THE COURT: And then, they wake up and they find
3 they have liability. It is what it is. And so, unless
4 there's a structured resolution where everybody has some skin
5 in the game and you can see why a release is being asked for,
6 a release to a party who's really generated nothing, other
7 than convenience is very unlikely here.

8 MR. SOUTHARD: Understood, Your Honor. I am
9 familiar with the recent caselaw, as well. It's something we
10 watch pretty closely in our office for obvious reasons. And
11 we will take a look at what I believe you're referring to is
12 the Fink's case and use that --

13 THE COURT: Now, I'm waiting for an amended
14 disclosure statement to see how these folks are handling it.
15 I have no idea when it's coming in, or what the final
16 question will be done at confirmation. But at the hearing, I
17 made it very clear, not that I follow Judge Bernstein, I got
18 a lot of respect for him and I think his analysis in some of
19 that is very consistent with what I've always believed to be
20 true. I've only granted third-party releases I think in one
21 case years ago. A case called Coastal something; where we
22 set it up so folks could vote and then agree to a release
23 because they got something. And the people who didn't -- the
24 parties who were seeking a release says they don't care. If
25 two or three people chase them; it didn't matter. So that

1 worked out. But other than that, we've -- I find that one of
2 the problems in third-party releases that really hasn't been
3 discussed much, I don't think, is in analyzing that the 11
4 produces a Debtor result than the liquidation analysis.

5 One, I'm not sure it's fair in not-for-profits
6 because you can't force somebody to settle.

7 MR. SOUTHARD: Mm-hmm.

8 THE COURT: But two, even if it is done, then the
9 person in a 7 would always maintain their right to bring a
10 cause of action. In other words, a Creditor against the
11 third-party, would always have a right in a 7 to bring that
12 action. In the 11, they're not -- that right is being lost.

13 MR. SOUTHARD: Mm-hmm.

14 THE COURT: So some people could argue that I'm
15 getting less at -- there's a lot of balance to this. But
16 it's a question that's going to have more and more airtime
17 and I think the best way to do it is to anybody who's looking
18 for release should have some ability to point to something --
19 what they've done for the benefit of the creditors; opposite
20 that, I don't see it happening.

21 MR. SOUTHARD: Understood, Your Honor.

22 THE COURT: Okay. So you'll be back on the 18th.
23 You'll tell me what this class action -- where we're going
24 with that.

25 MR. SOUTHARD: Yes, Your Honor.

1 THE COURT: If that survives confirmation, that
2 will also be something that the Silverman firm will handle?
3 Or, another firm?

4 MR. SOUTHARD: Potentially, Your Honor, that's
5 something we would need to discuss. My belief and hope is
6 that it won't be something that survives confirmation, but in
7 the event that it does, we'll need to talk about that.

8 THE COURT: All right. I have a lot of faith in
9 you guys. Anybody else? Need any money? You want anything?
10 Or -- it's a good day.

11 MR. SOUTHARD: Thank you, Your Honor.

12 THE COURT: All right. Thanks guys.

13 MAN 1: Thank you.

14 MAN 2: Thank you, Your Honor.

15 (Whereupon these proceedings were concluded at 2:23 PM)

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C E R T I F I C A T I O N

I, Sonya Ledanski Hyde, certified that the foregoing
transcript is a true and accurate record of the proceedings.

Sonya

Ledanski Hyde

Digitally signed by Sonya Ledanski Hyde
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Date: December 12, 2017

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